

December 22. 1760.

Unto the Right Honourable the Lords of Council and Session,

*Vide N^o. 15 and 16
Volume 15th.*

T H E

P E T I T I O N

O F

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Mrs. *Margaret Murray*, Daughter of *Alexander Murray, Esq;* Fiar of *Cringlety*,

Humbly sheweth,

THAT your Petitioner, of this Date, intermarried with 1726
Mr. *James Justice* one of the principal Clerks of Session,
without making any Contract of Marriage, and being pro-
vided in 9000 Merks of Portion by her Father's Bond of
Provision, bearing Interest from the Time of his Decease, it was
thought expedient, by the Friends on both Sides, that a Marriage
Contract should be entered into betwixt her and her said Husband.

That accordingly, a postnuptial Contract was executed upon the
13th February 1727, betwixt your Petitioner, with Advice and Con-
sent of her Brother *Alexander Murray of Cringlety, Esq;* on the one
Part, and Mr. *James Justice*, with Advice and Consent of his Father
Sir *James Justice*, on the other Part; whereby, in Consideration of
the Sum of 500 l. Sterling thereby acknowledged to have been paid

A

to

to the said Sir *James*, and Mr *James Justice*, in name of Dote and Tocher with your Petitioner, the said Sir *James Justice*, became bound and obliged to make Resignation of the Lands therein mentioned, for new Infeftment therein to be given to your Petitioner in Liferent.

That the said Mr. *James Justice*, some Years after, throwing off all Regard to Decency and Religion, and in direct Contravention to the Marriage Vow which he had entered into, deserted his Family and your Petitioner, and lived in a State of the most publick and avowed Adultery, from the Year 1743 to the Year 1749, which reduced your Petitioner to the disagreeable Necessity of prosecuting a Divorce upon the Head of Adultery, before the Commissaries of *E-dinburgh*; in which, after the most clear and satisfactory Proof of his Guilt, she obtained Decree.

That, by this Decree, in exact Conformity to all the other Decrees of Divorce obtained by a Wife against her Husband, on the Head of Adultery, now on Record, "The Commissaries found Facts, Circumstances, and Qualifications proven, relevant to infer Adultery against the Defender, and found him guilty of Adultery, and therefore divorced and separated him from the said Mrs. *Margaret Murray* Pursuer, her Society, Fellowship, and Company, in all Time coming; and found and declared her free of the Marriage contracted, solemnized and compleated between the Defender and her, and that she is at Liberty to marry whom; and when she best pleases, as if the Defender were naturally dead, or that she had never been married to him. And found and declared, That the said Mr. *James Justice*, Defender, had amitted and lost the Dote and Tocher, and all other Goods and Gear whatever brought with the Pursuer, or any other Ways promitted, pactioned, and agreed to be paid to him *causa matrimonii, nomine dotis, et propter nuptias*, and that she hath good and undoubted Title, Interest and Access summarily to the Provisions, Obligements, Conditions, and Clauses conceived in her Favours, and to the Jointure provided to her by the Contract of Marriage past between the Defender and her, siklike, and in the same Manner, as if he were naturally dead."

That, upon this Decree of the Commissaries, your Petitioner brought an Action before your Lordships against the said Mr. *James Justice*, wherein she concluded for Repetition of the 500 l. which had



had been received in name of Dote and Tocher with her, and obtained Decreet in Absence for the same.

That, of this Decreet, Mr. *Justice* thought proper to raise a Reduction, which coming before Lord *Woodhall*, Ordinary, his Lordship was pleased to appoint Informations to be given in, and to take the Cause to report to your Lordships.

That your Lordships were, of this Date, pleased to pronounce the following Interlocutor. “ On Report of Lord *Woodhall*, the Lords “ sustain the Reasons of Reduction, and reduce, and decern.”

Against this Interlocutor, the Petitioner humbly begs Leave to reclaim; and, however unwillingly she may have been on this, and former Occasions, dragged into Court, she hopes she will be pardoned for submitting to your Lordships Review, an Interlocutor, by which her patrimonial Interest is considerably hurt, and which, if it remain unrepealed, it is apprehended, may be attended with very important Consequences to the Law of this Country.

Your Petitioner shall not take up your Lordships Time with general Declamations upon the pernicious Consequences with which Violations of the Marriage Bed are attended to Society. The Depravity of Manners, which must take Place in the Breast of a Person guilty of such a Crime, and the total Want of any feeling of Decency, which must be the unhappy Fate of one who shall so far persist in his Crime, as to allow a Divorce to be taken out against him, are too obvious to be insisted upon. Neither is it necessary to raise your Lordships Indignation against the Crime itself, by insinuating, that the Violations of conjugal Chastity have, in all Ages and Countries, been marked as the Causes and Forerunners of a general Corruption of Manners. These, every Person must be abundantly sensible of, and every good Man desirous to give a check to. Such, perhaps, may prove the Consequences of these Crimes in our State, and such are described to have been the Effects of them among the *Romans*,

*Fœcunda culpæ sæcula, nuptias,
Primum inquinavere, et genus, et domos;
Hac fonte derivata clades
In patriam, populumque fluxit.*

HORACE.

The Petitioner is fully convinced of your Lordships Abhorrence at such Crimes, and just Desire to lay every legal Restraint upon the Commission of them; and she is persuaded, if she shall be able to show your Lordships, that the Repetition of the Portion is founded in Law, and is the natural and legal Consequence of the Dissolution of Marriage upon the Head of Adultery, that she will obtain an Alteration of the Interlocutor complained of.

And, in order thereto, the Petitioner shall endeavour to point out to your Lordships, that when the Divorce was obtained on the Head of Adultery, the Wife was not only intitled to her Provisions, legal or conventional, out of the Husband's Estate, but likewise to the Repetition of her Tocher, by the Civil and Canon Law, the great Sources of the Law of *Scotland*, and that such is the modern Law of most Nations. That, *2dly*, such has been held to be our Law, in the Opinion of the most eminent Lawyers, both ancient and modern, and that such is expressly statuted to be the Law of *Scotland* in the Case of wilful Desertion. *3dly*, She shall endeavour to point out the Analogy betwixt the Civil and Municipal Law, in order to obviate any Objections upon that Head; And, *lastly*, shall make Answer to such Arguments as have been urged against the Petitioner's Claim.

As to the Civil Law, the Voice of the Doctors is so unanimous upon this Head, that two Quotations from the Text seem sufficient to establish the Doctrine. The *first* is contained in *L. 8. Cod. de repudiis*, a Constitution of the Emperors *Theodosius* and *Valentinian*. In the 2d Section of that Law, the Emperors relate the several just Causes of Divorce, which it is unnecessary here to repeat. It will suffice to cite the following Words from it: *Si qua igitur maritum suum adulterum, &c. probaverit, tunc repudii auxilio uti necessario permittimus libertatem, et causas discidii legibus comprobare.* And, in §. 3. after enacting the Penalties against a Wife, who should send a Bill of Divorce to her Husband, without a just Cause, these Words occur, as to the Consequences of the Husband's being divorced for a just Cause; *Si vero causam probaverat intentatam, tunc eam et dotem recuperare, et ante nuptias donationem lucro habere, aut legibus vindicare censemus, et nubendi post annum, ei (nequis de prole dubitet) permittimus facultatem.*

The other Authority is contained in the 117 Novel, *Cap. 8. Sect. 2.* where the Rule is laid down in these Words: *Si de adulterio maritus*

ritus putaverit posse suam uxorem convinci, oportet virum prius inscribere mulierem aut etiam adulteram; et si hujusmodi accusatio vera esse ostenditur, tunc repudio misso habere virum super ante nuptias donationem etiam dotem et si quidem habeat uxorem adulter accipere eam et dotam propriam, et propter nuptias donationem.

Upon the Canon Law, and the Practice of modern Nations in this Respect, the Petitioner shall submit to your Lordships the following Authorities, the first is, that of *Julius Clarus, libro 5. Sententiar. § Adulterium, Num. 12. alia quoque est poena adulterii de jure canonico; nam propter hoc crimen, agi potest ad separationem thori, necnon et ad dotis et donationis propter nuptias privationem, and Num. 13. et scias, quod hoc casu si matrimonium separetur, propter adulterium commissum a viro, tenetur ipse uxori dotem suam restituere. Et ita affirmant doctores omnes, ut ait Paris. Consil. 54. 42. lib. 4. Si viro separetur propter adulterium commissum ab uxore, ipsa amittit dotem, neque potest illam amplius repetere. Et hoc tam de jure civili quam de jure canonico.* And, to the same Purpose, the learned *Gronewegen*, where he is treating of the Causes of Divorce, the Consequences thereof, and the Agreement in that Respect betwixt the Civil and modern Laws, has these Words, *Fol. 827. ad Nov. 117. Cap. 10. Hodie nulla est justa divortii causa præter adulterium. Soluta autem ex causa adulterii matrimonio, adultera non modo dotem amittat, quæ poena comprobata est; verum etiam quicquid ex conventionem, aut conjugali longæ communione, lucrata fuisset;* for which he cites a Number of Authorities, and adds, *Eademque poena etiam in marito adultero obtinet, D. D. allegat;* and these Authorities are further confirmed by that of the accurate *Van Lewen*, in his *Censura forensis, Lib. 1. Cap. 15.* He first defines the Causes of Divorce, in these Words: *Fornicatio igitur, sive adulterium, præcipua divortii causa est; qua maritus, propter uxoris adulterium, civili actione ad thori sive matrimonii separationem contendere, et experiri potest. Cap. 5. extra de procurator dict. cap. significasti et cap. ex literis extra de divort. et e converso, uxor contra maritum a dultorum pari ratione agere potest ad divortium et matrimonii dissolutionem. Canon in conjugis et seq. vers. similiter 32. Quaest. 1. Cap. quaesivit 2. extr. and, in the following Words, he relates the Consequences of such Divorce, Num. 9. Et maritus adulter amittit donationem propter nuptias, dotemque uxori restituere cogitur; and adds, Nec hoc*

mutatum moribus, Boer. Decif. 338. Num. 2. quod et cum jure Saxo-nico convenit, teste color. Part. 1. Decif. 175. in fine.

Thus likewise Voet, in the Title, *ad legem Juliam de adulteriis*, § 11. says, *Praeterea, propter adulterium peti posse a conjuge infonte separationem matrimonii: dictum latius in tit. de divortiis, et dotem vel propter nuptias donationem nocenti conjugi ademtam innocentem cedere; quod et moribus hodiernis obtinet, dum constitutum ab Hollandiae ordinibus, edicto politico, ann. 1580, art. 18. poenas superius enarratas infligendas esse, salvo infonti conjugi jure suo, secundum jus scriptum sibi competente.*

The plain Meaning and Import of all these Quotations is, that the Party who, by his Crime, gives Occasion to the Divorce, who violates the Marriage Vow who dissolves the Marriage, which, in the Intention of Parties, is understood to be perpetual, that is, to continue till Death, loses all benefit which he either already has, or would have acquired through the Marriage, which, on the other Hand, accrues to the Party innocent, who has been faithful to his Promise, and; who, on that Account, likewise acquires Right to whatever Provisions or Advantages were by Law, or Paction, provided to him by said Marriage; that the Husband, if guilty of Adultery, repeats the Portion, and the Provisions which are made in favour of the Wife take Place; and, on the other Hand, if the Wife is guilty of Adultery, the Portion remains with the Husband, and she is debarred from the Provisions, to which, by Law or Practice, she would otherwise have had a Right.

Such being the Constitutions of the Civil and Canon Laws, it was extremely natural, that this should be the Municipal Law of Scotland. While this Country was in a rude unpolished State, and had but few Laws of its native Production; these were the Fountains and the Sources of the Law of Scotland, and even yet take Place where our proper Law is defective. Before the Reformation, most Jurisdiction, and particularly that relating to Marriage, was vested in the Clergy; they, from their frequent Intercourse with Rome, were well acquainted with the Civil Law, and from the Religion that then took Place, the Canon must have been of the greatest Authority. There can be little Doubt then, that the Officials of the Bishops, to whose Decision Questions of this Kind properly belonged before the Reformation, would decide agreeable to the Principles already

ready laid down : but, what seems to put this beyond Doubt, is the Authority of the learned Sir *James Balfour*, who was one of the first Commissaries of *Edinburgh*. The Commissary Court, at its first Institution, *anno* 1563, must have proceeded on the Practice of the former Officials, and that the Petitioner's Claim was founded in their Practice, appears from the following Passage in *Balfour's Works*, a Book of the greatest Authority, in a Question of this Nature, as it is intitled the Practicks of the Law, which shows, that it does not so much contain a System of Law founded upon the Judgment of a Lawyer, as what had been previously established to be Law ; and, in the following Words, he expressly decides the Question in favours of your Petitioner, and supports it by a Decision of this supreme Court, before the Institution of the Commissary Court, and consequently confirming a Decree of the Officials.

The Passage is contained in p. 99. of his Practicks ; when any Man and his Wife are *simpliciter* partit, and divorced by Authority of the Judge-ordinary for Adultery, or any other Trespass committed by the Man, the haill Tocher, and all that *was resavit* by the Man frae the Woman, be Virtue of the Marrimonie contractit betwixt thame, ought to be restorit to the Woman, with the Profites thereof, after the giving of the Sentence of Divorce betwixt them, 18th December 1540. *Janet Auchinleck contra James Stewart*.

To this Authority may be joined an Argument, drawn from the Stile of the Decree of the Commissary Court, in the Case of a Husband divorced from his Wife for Adultery, which is uniform, as far back as the Records of that Court can be traced, it is in these Words :
 “ That the Defender hath amitted and lost the *Dote and Tocher*.
 “ and all other Goods and Gear whatsoever brought with the Pursuer,
 “ or any Ways promitted, pactioned, and agreed to be paid to him,
 “ *causa matrimonii nomine dotis et propter nuptias* ; and that she hath
 “ good and undoubted Title, Interest and Access summarily to the
 “ Provisions, Obligements, Conditions and Clauses conceived in her
 “ Favours, and to the Jointure provided to her by the Contract of
 “ Marriage past between the Defender and her,” sicklike, and in the same Manner, as if he were naturally dead.

These Words cannot be considered as Words of Course, or *per incuriam posita*, they clearly, and in express Terms, define what the Tocher is, *viz.* Whatsoever the Wife brought with her ; and with equal Propriety and Exactness, find, That she has Right to her Jointure, and, in so far, may be considered as declaratory of the

Law,

Law, as it took Place during the Time of the Officials, and as it stood at, and has since continued from the Institution of their Court; and may likewise be further looked upon as explanatory of the Words, Tocher and *donationes propter nuptias*, if any Ambiguity can arise about them. Besides, that these are not mere Words of Stile, appears from this, that there is a different Form used in the Decree when a Wife is divorced, as being guilty of Adultery.

The Petitioner shall content herself with what is above said to evince to your Lordships, that such was the Law of the Country, in relation to Adultery, before the Act of Parliament 1573, *Cap. 55*, which introduced Divorce upon the Head of wilful Desertion. There can be no doubt, that, after this Statute, the Consequences of Adultery would continue the same as they were formerly, and that they would be the same, at least, if not heavier, upon the Party offending in the Case of Adultery, than in that of wilful Desertion; since the one is surely a greater Crime than the other; as Adultery must be the Effects of a vicious and depraved Disposition, whilst Desertion may proceed from an unconquerable Aversion. But the Consequences of Divorce on the Head of wilful Desertion, are clearly defined in these Words of the Act 1573, *Cap. 55*. "That the malicious and obstinate Desertion of the Party Offender should be an sufficient Cause of Divorce, and the said Party Offender *should tyne and lose their Tocher, et donationes propter nuptias.*"

These Words can admit of no other Interpretation, than that the Husband should tyne, and repeat the Tocher he received from his Wife, and at the same Time the Provisions, which, by Law or Pactition, were provided to her; and, on the other Hand, that the Wife, if divorced upon this Head, should tyne or lose the Tocher she had brought with her, and, at the same Time, forfeit the *donationes propter nuptias*, or Provisions, whether legal or conventional, to which she would otherwise have had Right by the Dissolution of the Marriage. It cannot be supposed, that, in an Act of Parliament, of such high Consequence, the supreme Legislator should throw in Words without any Meaning, Force, or Intention. It might as well be said, that the Words *dos et donatio propter nuptias*, had crept into all the above Quotations *per incuriam*. But the Words themselves are clear and explicit, and applicable to whatever Party shall be the Offender. It is not said, that *the Wife alone shall lose her Tocher*.

cher et donationes propter nuptias; but, in general, that the Party Offender (*i. e.* whether the Man or Wife) as the Words Husband and Wife are both mentioned in the former Part of the Act shall lose *their* Tocher, which is extremely applicable to the Husband, if we shall suppose the Tocher to belong to him; and to the Wife, in the View, that the Tocher was her's, or that she brought the Tocher along with her.

The Word Tocher can admit of no Dubiety in the *Scots* Language, and that the Words *donationes propter nuptias* were used in our Law Language at that Time, to signify the Provisions legal or conventional, to which the Wife was entitled out of the Husband's Estate, by the Dissolution of the Marriage, besides other Authorities to be afterwards noticed, appears from the learned *Craig, Lib. 2. Dieg. 22. §. 23.* who likewise makes use of the Words *Dos* or Tocher, to signify the Fortune brought with the Wife.

It may be observed, that this learned Author was born in the Year 1548, and at the Time this Law past, could neither be ignorant of the Terms of it, nor of the Import of the Words therein contained; and when he is treating of the Consequences of a Marriage being dissolved within Year and Day without any Offspring being procreated thereof, he makes use of the Words *Dos* and *donationes propter nuptias* in the Sense contended for. The Passage referred to runs in these Words: *Ex altera Parte, an mortuo viro intra annum et diem, nulla prole relicta, mulier ab usufructu sive conjuncta infeudatione cadat dubitatum vidi imo rem totam in senatu accerrime agitari. Et profecto in hoc casu videtur eadem esse ratio, nam ex jure per omnia exequate sunt hodie donationes propter nuptias et dotes; sequitur ergo necessario, ut quo casu vir, mortua uxore, dotem amittit; eodem casu, mortuo viro, mulier donationem propter nuptias amittit; et quo casu vir, mortua uxore, dotem lucratur, eodem casu, amisso viro, mulier lucrabitur donationes propter nuptias; hac propositio tam ex jure Cæsario, quam nostro scripto constar, sed mortua conjuge intra annum, vir amittit dotem, quod omnium seculorum usu comprobatum est; ergo, et mortuo viro intra annum, eadem ratione, mulier amittit donationem propter nuptias; sive ea donatio sit conjuncta investitura, sive usufructus.*

In the same Sense these Words appear to be used by foreign Lawyers, than *Boerius Decis. 338, P. 708,* says, *Questionem utrum vidua, inhoneste et impudice vivens, perdat dotem et præ dictum doerium sive donationem*

nationem propter nuptias, si maritus eam accusaverit, et sententiam reportaverit quoad separationem a Thoro et Mensa, &c.

And indeed the following Passage of Gronewegen must throw great Light upon the Question, as it shows that the Doctrine contended for by the Petitioner, takes Place in other Countries, where Divorce for wilful Desertion is permitted; and particularly by the Saxon Law, from which Sir George M'Kenzie, in his observations upon this very Act, observes this Statute was derived; the Passage is contained *Lib. 1. Cap. 15. de sol. matrimonio*; and it further merits your Lordships Attention, as it points out the just Reason upon which the Offender rines or loses the Provisions, legal or conventional, which accrued to him, by entering into the married State, *porro quum matrimonium, per malitosam desertionem, etiam quoad vinculum conjugale solvatur, consequens etiam est, ut desertor malitosus a successione conjugis repellatur; eique omnia ea, quæ alioqui ex statuto, consuetudine, pactisve dotilibus, competiissent, denegantur: quum ea causa quæ sufficit ad matrimonii solutionem, etiam sufficiat ad introducendam dotis ac portionis statutarie amissionem. Et præterea omni statuto, aut pacto dotali, quæ superstiti conjugi portionem bonorum deferunt, tacita inest conditio, si conjux suum faciat officium, et fidem conjugalem servet; ut ex Constit. Elect. 16. Part 2. ob eam rationem jure Saxonico receptum refert, Petr. Heig, Part 2. quest. 33. num. 42.*

The Petitioner shall further on this head beg leave to refer to *Voet Lib. 24. Tit. 2. de divortiis et repudiis, § 9.*

Skeen de verborum significatione has indeed been referred to, to prove, that by *Dos*, ~~as~~ understood the Provisions made by the Husband to the Wife: His Words are, *Dos* has twa Significations, *first*, it signifies that quhilk is given to the Husband with the Wife, be Reason, and in Contemplation of Marriage, in the Civil Law is called *Dos*, in our Municipal Law, *Maritagium*, *TOCHER-GUD, Lib. 2. C. Dos autem 19.* Secondly, *Dos* is taken for that Gift and Disposition of Lands and Tenements quhilk ane Man gives to his Wife quhen he marries her at the Kirk Dure, or in the Face of the halie Kirk, quhilk aught and fuld be ane reasonable third Part of all and hail the Tenement of Land, quhilk the Man or Husband has at the Time of the Desponsation or Marriage.

But it is humbly apprehended, the Quotation from this Author is nothing to the Point, for the Words in the Act of Parliament 1573, are

are not *Dos* but **TOCHER**, which *Skeen*, in the above Quotation, receives in the first Acceptation of the Word *Dos*, agreeable to the *Scotch* Idiom; and tho' the Word *Dos*, when put alone, may sometimes be received in the second Signification, yet it can never admit of that, where it occurs along with *donatio propter nuptias*, and is placed in Contradistinction to it. It is plain, that *Skeen* is far from saying, that the second Signification is the proper Meaning of the Word *Dos*, for he quotes *Tacitus* in favours of that Meaning, probably alluding to that Passage of *Tacitus de moribus Germanorum*, where he says, That among the *Germans*, *dotem non uxor marito sed uxori maritus offert*; but this can never be the Meaning of the Word, where a contrary, tho' perhaps a less laudable Custom takes Place, that of giving Money with the Wives, instead of receiving it for them.

The Petitioner, hoping she has satisfied your Lordships, that the Words *Tocher*, and *donatio propter nuptias*, in the Act of Parliament 1573, ought to be received in the Sense she contends, shall proceed to state to your Lordships the Authorities of some of our most eminent Lawyers, both antient and modern, from whence she hopes to evince, that her Claim for Repetition of her *Tocher* is founded in the Law of this Country.

The first that occurs is that of Sir *Robert Spotswood*, who was born in the Year 1596. Under the Title of Divorcement, he says, "Divorcement being made for the Husband's Fault, the *Tocher*, and all that he received with his Wife, by virtue of the Contract of Marriage, should be restored to her, with the Profits thereof, after the giving the Sentence of Divorcement betwixt them."

The next is that of my Lord *Stair*, *Book 1. Tit. 4. §. 22.* in these Words: "Mariage dissolved by Divorce, either upon wilful Non-adherence, or wilful Desertion, or Adultery, the Party Injurer, loseth all Benefit accruing thro' the Marriage, as is expressly proved by the foresaid Act of Parliament 1573, C. 55. concerning Non-adherence, but the Party injured hath the same Benefit as by the other's natural Death, *March 21st, 1637, Lady Manderstone contra Laird of Renton.*"

The plain Meaning of this Author is, that the Party Injurer, whether Husband or Wife, loses all Benefit accruing through the Marriage, consequently the Husband loses the *Tocher*, as having accrued through the Marriage; and that the Party injured, which in the Case supposed must be the Wife, acquires Right to the Provisions which she

she would have had, if the offending Husband had died. It was needless for him to add, that the Party injured acquired Right to the Tocher, or other Benefits accruing through the Marriage, because that must be the natural Consequence of the Party Injurer's having lost them. Neither can he be so interpreted as to mean, that the Party injured had only the same Benefit as by the Death of the Offender, because it is the natural Consequence of what he says before, that she must have more; and altho^o he does not repeat it, such is the natural Consequence of his Words. And it would be absurd to argue, that because he has said the Party injured would have the same Benefit as in the Case of Death, that therefore she should have no more, for it is plain that my Lord *Stair*, by these last Words, means to express the Right to the Jointure; and as to that, he says, the Party injured shall have the *same* Benefit, *i. e.* equal Benefit, or equal Right to it, as if the Party offending were naturally dead: That these last Words are applied to the Jointure, is evident from the Decision annexed, which only relates to the Jointure; and likewise from this, that by his former Words the Fate of the Portion, as has been observed, was already decided. It has already been shown from other Authorities, that the Party injured, if the Wife, has not only the same Benefit, but a further one; and it is apprehended, that his Lordships Words, so far from derogating from the Petitioner's Argument, is a strong Authority in her Favour; and the Decision which is quoted by his Lordship, *Lady Manderston contra Laird of Renton*, cannot be alledged as an Authority to prove, that the Wife, in the Case of Devorce, is intitled to no more than by the Death of her Husband, for when that Decision is looked into, it relates to a Question betwixt the Lady *Manderston*, whose Husband had been divorced from her for Adultery, and one who was in Possession of a certain Subject, provided to her in Life-rent by her Contract of Marriage. She was not there disputing with her Husband as to the Recovery of her Portion, she had no doubt got that before, in consequence of the Commissaries Decree, and accordingly there is not one Word mentioned about the Portion in the whole Decision.

It is evident too from the Context of my Lord *Stair*, that he establishes a Difference betwixt the Case of Marriage dissolved by Death, and on the Head of Divorce, for in the 19th §. of said Title, he discusses the whole Question fully, relating to the Dissolution of Marri-

age by Death, and the Consequences thereof; and if it had been his Lordship's Opinion, that Divorce had produced the same Effects, it would have been natural for him to have said so, at the End of that Paragraph, and not to have distinguished the Consequences of Divorce as a different Doctrine into a separate one.

Neither can Sir George M'Kenzie, in his Observations upon the Act of Parliament, avail the Pursuer; for tho' he there says, that the Wife gets her conjunct Fee, and every thing else to which she would have had Right if her Husband had died, that can never be so far mis-constructed as to imply, that she had Right to no more; the Decision he there quotes, that of Lady Manderston, proves she had Right to her conjunct Fee; but, as already observed, it cannot from that Decision be inferred, that she had Right to no more.

The Petitioner shall farther beg Leave to transcribe, without any Comment, the Words of the late learned, accurate and ingenious Institutions of the Law of Scotland by Mr. Erskine, lib. 1. tit. 6. § 25. " The legal Effects of Divorce on the Head of Desertion are particularly defined by 1573, cap. 55. nearly copied after Nov. 117, c. 8. § 2. by which Statute the Party offending forfeits the Tocher, and the *donationes propter nuptias*. By *donationes propter nuptias*, when applied to our Law, must be understood, the Provisions that the Wife is intitled to either by Law or Paction, in consideration of the Tocher; and the Sense of the Act is, that the offending Husband shall repeat the Tocher, and forfeit to the Wife all her Provisions, legal and conventional; and, on the other Hand, the offending Wife shall forfeit to the Husband her Tocher, and all the Rights that would have belonged to her in the Case of her Survivance. This Lord Stair, P. 35. § 20. reasonably judges to be also the Rule in Divorces upon the Head of Adultery; as it was by the Roman Law, D. Nov. 117." It need only be observed, that these last Words show, that this judicious Author understood Stair, in the Sense above contended for by your Petitioner.

To this she shall beg Leave to subjoin an Argument, drawn from a Decision observed by Lord Haddington. The Decision is in the 1560, Lord Eglinton contra Lady Eglinton, and is collected in the following Words: " An Marriage ought to be annulled *propter impotentiam*. Giff the Pursuer seek the *donationem propter nuptias*, her Summons on that Point cannot be sustained, seeing the Separation is not *propter violationem conjugalis thori, sed propter impedimentum naturale*."

It is undoubted Law, that in the Case of Impotency the Wife is intitled to the Recovery of her Portion ; and it appears by this Decision, that, besides that, the Lady *Eglinton* made a Demand for her Provisions contained in the Marriage Contract, which was rejected ; but it is plain from the Reason, on account of which it was rejected, *viz.* that the Marriage was dissolved *propter impedimentum naturale, non propter violationem conjugalis thori*, that had the Marriage been dissolved for Adultery, she would have had an undoubted Right to both.

To these Authorities the Petitioner shall beg leave to subjoin that arising from the Decrees of the Commissary Court, by which, in a Condescendence of no less than fifteen Cases of Divorce for Adultery, hereto subjoined, it has been regularly found, that the Husband was liable to the Repetition of the Tocher ; and in one particular Case, *viz. Elizabeth Bateman contra William Forbes, 2d March 1704*, it appears, from the Records of said Court, that this Question was litigated by the Husband. and over-ruled by the Commissaries.

It has indeed been said, that there is no Evidence that these Decrees have been carried into Execution : But with equal Propriety it might be urged against a Train of subsequent Decisions of your Lordships, that Execution had never followed upon them ; the legal Presumption is, that these Decrees, as they were lawfully pronounced, so they were regularly executed ; and if the Defender denies that they were so, it is incumbent on him to show it : But it is believed an Investigation of this Kind would make as much against his Plea, as it would be difficult to execute it.

The Petitioner having thus endeavoured to satisfy your Lordships from Authorities in the Civil, Canon and Municipal Law, and the Decisions of the Commissary Court, that she is intitled to the Repetition of her Portion, as well as to her Provisions, legal and conventional, out of her Husband's Estate, can be at little Loss to account for the Principles on which these Authorities proceed, as it may easily be deduced from the Nature of the matrimonial Contract.

By the matrimonial Contract both Parties solemnly promise to live together as Husband and Wife, and to be faithful to one another during their joint Lives ; and it is *in tuitu ejus matrimonii*, upon this Condition of mutual Faithfulness, that the Provisions are made by the one Party to the other ; namely, the Tocher is given by the Wife or her Friends, to the Husband, upon Condition of his being a faithful

ful Husband, during the Subsistence of the Marriage, which in the View of Parties is supposed to be till Death; and in this Sense that the Marriage is to continue till Death in the *Roman Law*, *dotium causa dicitur esse perpetua*; and the Husband becomes obliged to live with and maintain his Wife, suitable to their Rank, during their joint Lives, providing she continues faithful; and he likewise, or the Law, provides a Jointure to her, for her Maintenance after the Dissolution of the Marriage, in case she shall continue faithful, during the Continuance of it.

Therefore, if the Wife is unfaithful to the Marriage Bed, by committing Adultery, the Husband is freed from the Obligation to maintain and live with her, and she, on Account of her Infidelity, loses all Right she would otherways have had to a Jointure, by the Dissolution of the Marriage, and the Husband retains the Tocher, because he has continued faithful.

On the other Hand, if the Husband proves unfaithful, and commits Adultery, he must return the Tocher to the Wife, because he got it upon the Condition of being faithful to the Marriage Bed, in which he has failed; so that the Condition upon which the Tocher was returnable, having existed, it falls to be returned; and the Wife, in regard that she has fulfilled the Condition of the Contract, and has continued faithful, has Right to her Jointure, or to suitable Maintenance, (of which the Law considers the Jointure as the proper Estimate) and therefore, her Jointure takes Place immediately upon the Decree of Divorce.

Neither does it make any Difference, whether the Husband has acquired Right to the Wife's Portion, by special Compact, Marriage Contract, or the Laws of the Land; and it is the same whether the Wife's Provisions are legal or conventional; for, in every Contract relating to the Marriage, in every Deed done *in tuitu* thereof, in every Statute conferring any Benefit *contemplatione matrimonii*, this is an implied Condition, arising from the Nature of Marriage itself, and founded in the good of Society (of which Marriage is the very Basis) that the Person upon whom this legal or conventional Right or Benefit is conferred, *occasione matrimonii*, shall continue faithful to his Marriage Vow.

This Principle is clearly laid down by *Gronewegen*, and, as above observed, must take place universally, whether the Rights and Benefits accruing *occasione matrimonii*, have arisen from Paction or Statute.

tute, nam, says he, *omni statuto aut pacto dotali, quæ superstiti conjugii portionem bonorum deferunt, tacita inest conditio, si conjux suum faciat officium, et pactum conjugale servet.*

This Principle is likewise exprest by *Craig*, Lib. 2. Dieg. 22. where he lays it down, that a Woman, when guilty of Adultery, loses her Terce, and is equally applicable to the Case, where the Husband is guilty of Adultery, and ought to lose the Portion; *neque enim ratio permittit, ut ex matrimonio illo, contra quod peccavit, commodum accipiat; frustra enim legis beneficium implorat, qui in legem peccat.*

And upon the Principle of implied Fidelity, in the Marriage Contract, it has been found, and is laid down by Lord *Bankton*, in his Institutions, Lib. 1. Tit. 5. § 99, "That there is an implied Revocation of a Donation, where the Donatory or Grantee is guilty of Adultery, and no Reconciliation interveened, because such high Ingratitude is sufficient to presume, that the Donor revoked the Grant, founded upon the Supposition of the Spouse's Fidelity to the Marriage Vows; and his Lordship there quotes *Hope de don. inter virum et uxorem, Douglass.*

It is in vain for the Pursuer to contend, that the Tocher has become the Husband's, and that it is understood to have purchased and come in Place of the Jointure; for upon the above Principle it has only become his, upon the Condition which the Parties must have had in View, that he should continue faithful, and that the Marriage should subsist till Death; and tho' it may have been consolidated with his other Substance, that can make no more for him, than if a Creditor was to alledge, that it was hard he should be obliged to pay his Debt, because he had spent the Money.

Besides, the Alledgance, that with the Portion are purchased the Provisions in Favours of the Wife, cannot hold universally, and is not founded in Principle; for if it were true, no Woman, who has not any Fortune of her own, nor one who had a Fortune that did not fall under the *jus mariti*, would be intitled to the legal Provisions out of her Husband's Estate, upon his Death; the Principle on which the legal Provision of Terce seems to have been made in Favours of the Wife, is exprest by *Craig* in these Words, L. 2. Dieg. 22. § 8. *ne ei deesset ad vitam honeste, et ex dignitate degendam*, the Husband is undoubtedly liable to the Maintenance of the Wife, by the Laws of all civilized Countries, and more particularly so, in a Country, where the Women are seldom possess of ample Fortunes; and

on this Account the legal and conventional Provisions seem to have been introduced ; and as the Cause of them remains when the Marriage is dissolved, the Provisions, which are the Effect, ought not to cease.

Upon this Principle it has been found, and is laid down in our Law Books, particularly by Lord *Bankton*, Lib. 1. Tit. 5. § 98. and Lord *Stair*, Lib. 1. Tit. 4. § 18. Fol. 35. that a Provision made by a Husband, tho' not in a Marriage Settlement, nor on account of Provisions made by the Wife to him, can neither be revoked by the Husband, nor reduced by his Creditors upon the Act 1621; tho' a Provision made by a Wife, in favours of a Husband, in these Circumstances, is considered as gratuitous, and may be revoked by her.

In every mutual Contract, the Party who performs his Part is intitled to repeat what he gave in Contemplation of that Contract, and likewise to Damages from the Party who breaks it *quod veniunt in locum rei*. But how is it possible to fix any adequate Sum in Name of Damages, to a Person, who upon the Faith of others observing the Contract, has spent the greatest Part of their Life with the other. As therefore the Nature of the Marriage Contract is such, that the Damages arising from the Breach of it cannot admit of any Value, the Party who has kept Faith, must be intitled to the Provisions made to them in that Event: Besides, in the Marriage Contract, the sole Condition upon which the Provisions are made in favours of either Party, is, that they should continue faithful ; consequently the Party who observes that Condition, must be intitled to the Provisions made by the other in his or her favours.

The same were no doubt the ruling Principles in the Civil Law: The Husband was obliged to restore the Portion to his Wife, and she was intitled to the remuneratory Provision of the *donatio propter nuptias*, in case the Husband was guilty of Adultery ; and in this Particular there is a perfect Analogy betwixt the Civil Law and our's.

It is true the *donationes propter nuptias* served as a Security to the Wife for her Portion ; but this was neither the sole nor the principal Purpose for which they were intended ; they were likewise intended for a Provision to her, in case a Divorce ensued through the Fault of the Husband. This is expressly laid down by *Vinnius in inst. L. 2. Tit. 7. §. 3.* where he is tracing the History, and assigning the Causes for the

the *donationes propter nuptias* by the Roman Law, he assigns the above as the principal one, in these Words: *Item hoc, ut viro temere divortium faciente, donatio hac aut tota aut pro parte lucro uxoris cederet, in quo doti quoque responderet, nam mulier sine justa causa divortens & ipsa amissione dotis plectitur.*

It has indeed been said that the *donationes propter nuptias* were by no Means analogous to Jointures; that they were merely a Security to the Wife for the Repetition of her Portion in the Event of her Husband's Death, or failing in his Circumstances. And as a Proof of this, it is alledged, that they were every Way similar to the Portion, and could neither be greater nor less than it.

But this Difficulty will be resolved by a very little Attention to the Roman Law; for it appears from *L. 2. ff. quib. mod. Pign. vel Hyp.* that the Wife had a preferable Hypothec upon her Husband's Estate for her Portion; and can it be supposed that the *donationes propter nuptias* were introduced solely for a Purpose which already took place by the common Law; nay it even appears, from *L. 29. cod. de jure dotium*, that the Wife, if her Husband was *vergens ad inopiam*, could vindicate both her *dos* & *donationes propter nuptias*, and prevent them from being affected by his Creditors.

And further, the *donationes propter nuptias* were for a long Time in the same State with our Jointures, either greater or less than the Portion, according to the Circumstances of the Husband; and it was by no Means necessary that they should be adequate to the Portion. This is observed by *Vinnius in inst. Lib. 2. Tit. 7. §. 3. Num. 5.* and it was not requisite that they should be equal in Quantity and Quality to the *dos*, till the 13th Year of *Justinian's* Reign, that he introduced that Equality by the 97th Novel; whereas, in the Case of Divorce, on account of Adultery, the *donationes propter nuptias* could be claimed by the Wife, agreeable to the Constitution of the Emperors *Theodosius* and *Valentinian*, contained in *L. 8. cod. de repud.* as far back as the Year 449; so that your Lordships will observe, that at least during the Period of near 100 Years, the *donationes propter nuptias* were exactly analogous to the Jointure in the Law of Scotland.

In order to take off the Arguments founded upon the Civil Law, it has likewise been said, that the *dos* among the Romans bore no Analogy to the Tocher with us, for that as to it the Husband was a *nudus usu-fructuarius*, and that the *dos* returned to the Wife or her Heirs upon the Dissolution of the Marriage.

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But in Answer to this your Petitioner begs Leave to observe, that by the antient *Roman Law* the Husband was the absolute Proprietor of the *dos*, and could dispose of it as he pleased. This appears from *Heineccius Syntagm. antiq. Rom. Lib. 1. Tit. 10. joined to Lib. 2. Tit. 8. §. 8. ejusdem*; and although the antient *Roman Law* was in so far varied, that in many Cases the Portion returned to the Wife upon the Dissolution of the Marriage, yet the Husband was still held the *dominus dotis*, could vindicate it, alienate it, or dispose of it, and the Wife had only a personal Action for the Recovery of it. This is clearly proved by *Vinnius, Lib. 2. Tit. 8. §. 1. Num. 2.* and although the *dos profectitia* returned to the Wife's Father, upon Dissolution of the Marriage by Death, yet a perfect Analogy continued in this Respect 'twixt the *dos adventitia* and the Portions in our Law, till such Time as *Justinian* took it away, *Lun. C. de rei ux. act. toll.* for the *dos adventitia*, or that which was given by an extraneous person, unless an express Stipulation had been made to the contrary, remained the absolute Property of the Husband after his Wife's Death, as is clearly evinced from *Heineccius, antiq. Rom. Lib. 2. Tit. 8. §. 8. Voet, Lib. 24. Tit. 3. §. 3. Noedt, eod. Tit. and Cujacius, Lib. 9. observat. cap. 3.* so that your Lordships will observe, that as to the *dos adventitia* there was an express Analogy betwixt it and the Tocher in our Law, from the Time that the Repetition thereof was introduced in the Case of the Husband's being guilty of Adultery, till the Time in which the Emperor *Justinian* lived.

There were likewise many other Instances in the *Roman Law*, wherein the *dos* was analogous to our's, particularly where *parta de lucranda* & *dote* were interposed by the Husband; and yet, without any Distinction on this Account, the Emperors *Theodosius* and *Valentinian* ordained 8 l. *Cod. de repul.* that the Portion should be repeated by the Wife; and indeed, where a general Constitution is to be made, it is impossible that Regard can be had to particular Partitions, which are as various as the Will of the Parties.

Therefore, whether your Lordships shall consider the Repetition of the Tocher now acclaimed by your Petitioner, as a natural Consequence of the Husband violating the Engagements he came under by entering into the married State, or as a Penalty inflicted to punish the Husband's Crime, or as given in *solatium* to the Wife; she apprehends, that the Analogy betwixt the *Roman Law* and ours is exactly

exactly the same. And it will require but few Words to convince your Lordships of the Justice and Expediency of it in either of these Views.

If it be considered as a Punishment upon the Husband, she apprehends it is a very just and proper one, more especially so in Days of Luxury, where the Provisions of a Wife are not a very considerable Part of the Husband's Estate, and do not often exceed the Settlements upon a Mistress. By this just Restraint, a Husband maybe kept from indulging his vitious or capricious Taste; whereas, if it is taken off, he may, at no great Expence, give Way to his vitious Inclination and Humour for Change; and, when the Wife can no longer retain him by her faded Charms, he may easily find a Way to be divorced from her, as is elegantly described by the Poet to have happened among the Romans.

*Tres rugae subeant, et ^{latus} secunda arida laxet,
Fiant obscuri dentes oculique minores,
Collige sarcinulas, dicet libertus et exi.*

JUVENAL.

If again, it be considered as a *solatium* to the Wife, it must appear just and reasonable, that such should be given to one *que tot annis consuevit cum adultero*; and if she should incline to marry again, she will, with Difficulty, find a Husband, *nisi veniunt de dote sagitte*.

It has been alledged upon the Part of the Pursuer, that if a Wife should be intitled to the Repetition of her Portion in the Case of her Husband's Adultery, that thereby an Inequality would be introduced betwixt the Case of a Husband guilty of Adultery, and that of the Wife divorced for the same Cause, as the Husband would be thereby obliged to repeat the Tocher, which had already become his by the Marriage, and likewise to give her a Provision out of his Estate; whereas, if the Wife were guilty of Adultery, he only retains the Tocher which had already become his by the Marriage, and consequently gets nothing, and is not obliged to give her the Provisions pactioned to her out of his Estate.

But in general, it may be observed, that the Consequences of a Divorce on account of Adultery, are much more fatal to a Woman than a Man. He, for the most Part, has a Fortune, besides the Provisions

Provisions which his Wife is intitled to, and Money sufficient to pay her Portion ; while, on the other Hand, a Woman who is guilty of this Crime, is utterly ~~destitute~~ and forlorn, he may enjoy Offices, nay, such is the partial Opinion of the World, may be received into Company, and enjoy many Comforts which a Woman in the same Situation is deprived of ; she, for the most Part, in such unhappy Circumstances, is shunned by her Acquaintances, and deserted by her Friends. If a Woman swerve from the Rules of Virtue,

*Ruin ensues, Reproach, and endless Shame,
And one false Step entirely damns her fame.*

But indeed, when the pretended Inequality is examined, it appears to be altogether accidental, as it depends entirely upon the comparative Riches of the Husband and Wife, and the Manner in which their Fortunes are secured.

In many Cases, the greatest Injustice would be done to, and the most cruel Hardship imposed upon the Wife, if she were not intitled to the Repetition of her Portion, when the Marriage is dissolved by the Adultery of the Husband.

Thus, if a Lady, whose Portion was 10,000 l. should marry a Man of a small landed Estate, who would, no Doubt, lend out the Portion in Bonds, if there was no Provisions stipulated in the Wife's Favours, all that she could be intitled to would be the third Part of her Husband's small heretable Estate, in case he should prove so ungrateful as to be guilty of Adultery ; and if in this Case there was a Contract of Marriage, whereby the Husband was obliged to lay out Part of that Money in Land, and in the Liferent of which the Wife was secured in the Event of her Husband's Death, all that she could possibly get by her Husband's Crime, if the Pursuer's Argument holds, would be the Liferent of that heretable Subject which was purchased with her own Money.

If, again, a Husband who had acquired a very large Fortune by his Wife, consisting either of Bills or Money employed in Trade, should lend out that Money in Bonds, and at the Dissolution of the Marriage by Divorce, for the Husband's Adultery, should not be posselt of any heretable Estate, nor of Moveables to any considerable Extent ; if the Consequences of such Divorce were to be the same, as

that of the Husband's Death, there is no earthly Subject whatever, which the Wife, by the Law of *Scotland* could affect for her Subsistence, as Money lent out on Bond does not fall under the *jus relictæ*.

But if in all these Cases, the Wife should be found intitled to the Repetition of her Portion, while Justice is done to her, no hardship is imposed upon the Husband, who, by his Crime, has justly forfeited any Title to Favour or Benefit.

Neither can there be any Hardship in the Husband's being obliged, besides repeating the Portion, to allow his Wife to enter to her Jointure, because by the Divorce he is freed of one part of the *onera matrimonii*, viz. the Maintenance of his Wife, to which the Jointures in this Country are generally no more than adequate.

And indeed in many Instances, allowing the Pursuer's Argument its full Scope, no Injustice is done by allowing the Wife to repeat the Fortune that she brought with her, in case the Marriage is dissolved by Divorce; for put the Case, that an Heiress possess of a Land Estate should marry a Gentleman likewise Proprietor of a Land Estate, in this Case, upon Dissolution of the Marriage by the Husband's Adultery, the Wife would be intitled, by the Petitioner's Argument, first to the Terce of her Husband's Estate, and secondly to the Liferent of her own; so that in this Case, supposing the Liferent of the Wife's Estate to be no more than equal to the Terce of her Husband's, she gets only one Subject which belonged to her Husband, viz. the Terce of his Estate, and she takes the Liferent of that Estate which was properly her own.

On the other Hand, in the Case supposed, if the Wife be guilty of Adultery, the Husband retains the Terce of his own Lands, and gets the full Liferent of his Wife's Estate, and is likewise freed from the Burthen of Maintaining her; so that in this Case he keeps the Subject which belonged to himself, and gains another, which belonged to his Wife; so that here your Lordships see, if Laws were to be reduced to the Chance of Equality or Inequality, the Inequality is rather in Favours of the Husband, he having got rid of an Obligation, to which he was otherways liable, by Marriage, viz. the Maintenance of his Wife, besides being intitled to a Provision out of her Estate.

If it shall be supposed, which is generally the Case, that the full Liferent of the Wife's whole Estate is greater than the third of the

Liferent

Lifenret of her Husband's, the Inequality is very much against the Wife: but it is humbly apprehended, that Law ought not to be determined by casual Equality or Inequality; if an Institution is good, wise, and just in itself, and founded in the general Principles of Law and Equity, it ought to take Place, although it may be attended with Hardships in particular Cases.

The above Cases are far from being improbable; and it may often happen in a Country where the Ladies are sometimes prevailed upon to accept Husbands, without stipulating previous Articles, that their Fortunes may be paid to their Husbands, or consisting of Bills, may fall to their Husbands, *jure mariti*, without any Provisions being made in their Favours; and in that Event, if the Husband should lend out the Money, arising from their Fortunes, in Bonds, and should afterwards be guilty of Adultery, or desert their Society, unless your Lordships shall find them entitled to the Repetition of their Portion, they must be totally deprived of any Means of Subsistence, not through their own Fault, but by their Husband's Crime.

It has been found, that an Heiress divorced for Adultery, loses not only her conjunct Fee and Tocher, but also her Liferent of her Heretage, to which her Husband acquired Right, *Colvill, March 1589*, Laird of *Innerwick* contra the Lady: But it is more than probable, that the Wife's Tocher, and the Liferent of her Heretage, would, in this Case, amount to a much greater Sum than the Provisions made by the Husband in her Favours; yet were Mr. *Justice's* Argument founded in Law, she could have got no more than these Provisions, by which there must have been the most glaring Advantage on the Part of the Husband.

But if the Principle of Law, which your Petitioner has all along laid down, shall be followed out, there can be no Inequality in the Wife's repeating her Portion, besides being intitled to her *conventional* Provisions; because, from it, the Tocher is only supposed to have become the Husband's, upon Condition that he prove faithful to his matrimonial Engagements, and that the Marriage should subsist till the Death of the Parties.

Even the Inequality, as stated by the Pursuer, Mr. *Justice*, taking it upon his own Principles, if examined, does not appear so great; for although the Wife be intitled to Repetition of the Portion, which, *ex hypothesi*, has become the Husband's, yet the conventional Provisions

sions must be understood to be her's at the Dissolution of the Marriage, even independent of the Crime of Adultery, for which it is dissolved; for they become her's immediately upon the Dissolution of the Marriage; so that the Marriage being dissolved by Adultery, she does not get two Subjects, which belonged to the Husband on Account of his Adultery, but only one, *viz.* the Tocher, because the legal or conventional Provisions upon her Husband's Estate have already become her's *eo ipso*, that the Marriage was dissolved not on Account of the Adultery, the Cause for which it was dissolved.

If we shall suppose a Marriage to be dissolved within Year and Day by Adultery; and that, in that Case, the Husband would forfeit the Provisions in Favours of his Wife, or the Wife, if guilty, her Portion; no Inequality whatever would ensue, as the Husband only loses the Jointure, the Portion not having become his; and the Wife, on the other Hand, if guilty, loses her own Portion, which was not become her Husbands.

The Petitioner submits how hard it is, that on Account of a post-nuptial Contract, she should be deprived of her Portion, which being secured to her by a Bond of Provision, not falling under the *jus mariti*, she should have had an undoubted Right to, if no such Contract had been made.

But whatever may be in the Equality or Inequality of the Case, which is purely accidental, she humbly apprehends, that it can have no Weight with your Lordships, if her Claim be founded in Law, which she hopes she has already sufficiently established.

It was argued for the Pursuer, that if a Wife should be found intitled to the Repetition of her Tocher, it might prove an Incitement to some Wives to seek after an Occasion of Divorce from their Husbands, and that the Consequence might prove ruinous to many Families.

It is indeed very difficult to conceive, how a Woman could force her Husband to commit Adultery, unless by denying him Access to her Bed; but it is thought there is no great Danger of this Expedient being put in Practice; since though it should be supposed Avarice might incline Wives to try this Expedient, there are other stronger Passions in a Female Breast which would be a sufficient Check upon it; and as to the Consequences with which this may be attended to

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the Family, it is believed your Lordships will not expect, that much Care will be taken of a Family by a Person so totally abandoned to every Sense of Virtue and Religion, as one must be, who has allowed Matters to come to that Extremity, as that a Divorce for Adultery should be past against him.

It was argued for the Pursuer, that the Commissaries being Judges only *ad civilem effectum*, could not inflict Penalties.

But it is surely the proper Province of the Commissaries to declare, what are the legal Consequences of a Divorce, in the same Way as a Reduction might be brought upon the Act 1587, Chap. 119, before your Lordships, at the Instance of the Heirs of a Person divorced for Adultery, in order to reduce a Deed done to their Prejudice by the Person so divorced, who had intermarried with the Adulterer, and consequently forfeited his Right to dispose of Heritage. The Deprivation of this Right is no Doubt a Penalty imposed by Law upon one divorced for Adultery, who intermarries with the Adulterer; and your Lordships Decree of Reduction would declare this Penalty to be incurred in the same Way as the Commissaries Decree declares, that the Person divorced has incurred the Penalty (supposing it such) which the Law itself has inflicted, and it is thought neither of these Decrees would be inconsistent with civil Jurisdiction.

It was separately pled for Mr. *Justice*, that the Petitioner's Portion was paid to him and his Father jointly; but this seemed to be given up by him in his Information to your Lordships, as he was conscious that the Petitioner could satisfy your Lordships, that her Tocher had been applied for his Behoof; and indeed it is expressly laid down in L. 22. § 12. *Solut. matrim. quemad. dos. repet.* that the Husband is liable to Repetition of the Portion, whether it be paid to him or another *ejus voluntate*.

The sole Recourse then which the Pursuer seems to have, is founded on the Decision in the Case of Lady *Lochquharret*; and indeed if such are the Principles of Reason, such the Constitution of the *Roman* and *Municipal* Law, and if, as has been endeavoured to be shown, no real Inequality arises from the Construction of our Laws, it may justly appear a Matter of Difficulty to account for the Decision in *Lochquharret's* Case; but if this Decision appears so contrary to the Principles of Law, that surely must found a strong Presumption, that the Judges went upon the particular Specialties of the Case; and indeed these Specialties were such as would have moved the best Men, and determined the wisest Judges.

The Question did not there occur betwixt the adulterous Husband and the innocent Wife, but betwixt a very criminal Wife and one-
 rous Creditors, who would have been intirely cut off by her prior Inhibition.

In that Case too, there was a *semiplena probatio* against the Wife herself, her Adultery being clearly proved by one Witness; and what is said in the *Roman Law*, upon a similar Occasion, might have influenced the Court in this Determination, *ut ea lege quam ambo contempserunt neuter vindicetur paria enim delicta mutua pensatione tolluntur.*

At any Rate this Decision is but single and unsupported, and cannot tye down your Lordships, where the Case is widely different and much more favourable. And in Opposition to this Decision, there stands one of your Lordships, in the Year 1540, *Janet Auchinleck* against *James Stewart*, and a numerous Train of Decisions of the Commissary Court.

So that the Question ^{is} upon this Head, Whether your Lordships will sustain a Decision of the Court, founded in the Rules of Law, or a late one, which must have proceeded upon Specialities, upon the Faith of which no Person can be supposed to have acted, and by the Alteration of which no Persons can be hurt in Time coming, but People will be obliged to regulate their Conduct upon the Principles of Religion and Virtue.

The Petitioner therefore hopes that she has satisfied your Lordships, that her Claim for Repetition is founded in the Canon, Civil, and Modern Laws of most Nations: that such has been held to be our Law, that there is a strong Analogy betwixt that and the Civil; and that she has obviated the Objections raised by the Pursuer, and on that account that your Lordships will be pleased to review and alter your former Interlocutor.

May it therefore please your Lordships, to review and alter your former Interlocutor, and repel the Reasons of Reduction.

According to Justice, &c.

ALEX. MURRAY.

CONDESCENDENCE of Decrets of Divorce, since 1693.

- Feb. 2. 1693. **A**NNA MONTGOMERY, against Captain *James Marshall* her Husband, who being convict of Adultery, the Commissars divorced and separated him from her (the Pursuer's) Society and Company; and declared his Marriage to be dissolved by his Fault, and that thereby he had lost and amitted *dotem et donationem proper nuptias*.
- Mar. 2. 1704. *Elizabeth Beatman* against *William Forbes* her Husband, who being convict of Adultery, the Commissars not only divorced him, deemed and declared that the said *William Forbes* had amitted and lost the Dowrie and Tocher, and all Goods and Gear brought with her on account of the said Marriage, or any Ways promised and conditioned, or pactioned to him, *causa matrimonii nomine dotis, et proper nuptias*; and sickenlike deemed the Pursuer to have full and complete Right to the Liferent Provisions provided by the said *William Forbes* to her, in Liferent, during all the Days of her Life, as if the said *William Forbes* were naturally dead.
- June 12. 1712. Mrs. *Jean Leslie* against Captain *Andrew Nairn*. The Decreet against him is in the same Terms.
- 27 May 1715. *Janet Rankine* contra *Walter Auchinloss*, found that he had lost all Sums, Goods, Gear, promised and contracted, or paid *causa matrimonii nomine dotis et propter nuptias*; and the haill Provision granted by the Pursuer to him by Contract, Matrimonial, or otherways, declared void and null.
- 30 June 1716. *Katharine Gillatly* contra Captain *James Hamilton*. The Sentence precisely in the Terms of the Decreet above mentioned, at the Instance of *Elisabeth Beatman* against her Husband.
- 1 Mar. 1718. *Margaret Drummond* contra *David Henderson*. The Sentence in the same Terms.
- 8 Nov. 1720. *Anna Graham* contra *Alexander MacFarlane*, ditto.
Dame Alice Paterson contra Sir *Alexander Dalnaboy*.
- 8 Sept. 1725. *Margaret Hamilton* contra *Henry Johnston*, ditto.
- 12 Mar. 1726. *Mary Rogers* contra *Alexander Stevenson*, ditto.
- 2 April 1729. *Marion Stewart* contra *Alexander Herbertson*, ditto.
- 27 Jan. 1730. *Margaret Nimmo* contra *Patrick Stone*, ditto.
- 26 Mar. 1731. *Elisabeth Scot* contra *James Boutcher*, ditto.
- 7 Aug. 1733. *Isobel Anderson* contra *Welsh*, ditto.
- Nov. 1744. *Christian Farquar* contra *MacNeil*, ditto.

